Engineered Storage Products Co., a Division of CST Industries, Inc. *and* Teamsters Local 330, International Brotherhood of Teamsters, AFL–CIO–CLC, Petitioner. Case 33–RC–4605

August 10, 2001

ORDER DENYING REVIEW

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix). The sole issue presented for review is whether the Regional Director erred in finding appropriate a unit of the Employer's solely employed employees, excluding employees supplied by Tandem Staffing Agencies. The request for review is denied as it raises no substantial issues warranting review. We agree with the Regional Director that the petitioned-for unit constitutes an appropriate unit. However, we do so for the following reasons.

In denying review, we do not rely on the Regional Director's finding that the agency-supplied temporary employees do not share a community of interest with the petitioned-for unit of the Employer's solely employed employees. Since, as the Regional Director found, the temporary employees and the regular employees work side by side at the same facility performing the same work, under the same supervision, and under common working conditions, they may share a community of interest. *Swift & Co.*, 129 NLRB 1391, 1394 (1961), *Kalamazoo Paper Box*, 136 NLRB 134, 138-139 (1962). Although a unit including the temporary employees may be appropriate, we find that they do not share such a strong community of interest that their inclusion in the unit is required, and therefore conclude that the petitioned-for unit of solely employed employees is appropriate. See *Holiday Inn City Center*, 332 NLRB No. 128 (2000). Cf. *Outokumpu Copper Franklin*, 334 NLRB No. 39 (2001) (inclusion of agency-supplied employees is mandated).

In applying the community of interest test to determine the scope and composition of bargaining units, the Board has consistently held that Section 9(a) of the Act requires only that a unit sought by a petitioning labor organization be an appropriate unit for purposes of collective bargaining. There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the most appropriate unit. *Morand Brothers Beverage Co*., 91 NLRB 409, 418 (1950). Therefore, contrary to the Employer's contentions, the fact that the jointly employed employees supplied by Tandem Staffing may share a community of interest with the petitioned-for employees does not mean that they must be included in the unit or that the petitioned-for unit is inappropriate. Rather, the test is whether the community of interest they share with the solely employed employees is so strong that it requires or mandates their inclusion in the unit. See e.g. *Overnite Transportation Co.*, 322 NLRB 723, 726 (1996). Clearly the facts here do not meet this test. Among other facts discussed by the Regional Director, Tandem Staffing hires and fires the employees it supplies to the Employer and sets their wages and benefits (which are lower than those of the Employer's regular employees). See *Holiday Inn City Center*, 332 NLRB No. 128, slip op. at 5-6. Accordingly, the facts support a finding that the jointly employed temporary employees supplied by Tandem Staffing do not share such a strong community of interest that their inclusion in the unit found appropriate is required.[1]

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer, a Delaware corporation, is engaged in the business of producing storage products and agricultural unloaders at its facility at 345 Harvestore Drive, Dekalb, Illinois. During the past 12 months, a representative period of time, the Employer purchased and received goods and materials in excess of $50,000 directly from vendors located outside the State of Illinois. Based upon the foregoing facts, I find the Employer herein is engaged in commerce within the meaning of the Act. The approximate number of employees in the unit found appropriate herein is 68.

4/ The parties stipulated that the Petitioner is a labor organization within the meaning of the Act, and I so find. There is no collective bargaining agreement covering any of the employees in the unit sought in the Petition herein, and the parties are in agreement that there is no contract bar. Furthermore, there is no history of collective bargaining affecting these employees.

5/ The parties stipulated that an appropriate unit would include all full-time and regular part-time employees, including

[1] *Interstate Warehousing of Ohio*, 333 NLRB (2001), is inapposite. In that case, the Board denied review of the Regional Director's finding that a unit of solely and jointly employed employees was an appropriate unit. There, the unit petitioned-for consisted of the solely employed *and* jointly employed employees, and the Employer contended that the jointly employed employees were required to be excluded from the unit. Because the petitioner there sought a unit that included the jointly employed employees, the issue before the Board was whether they shared a sufficient community of interest that they could be included in the petitioned-for unit. In contrast, the Petitioner here does not seek to represent the jointly employed employees and the Employer seeks to include them in the petitioned-for unit of solely employed employees. Thus, the issue here is whether the jointly employed employees share such a strong community of interest with the solely employed employees that they are required to be included in the unit.

all production, maintenance, material handling, shipping and receiving, quality, and plant clerical employees, but excluding office clerical employees, confidential employees, sales order coordinators, guards, professional employees and supervisors as defined in the Act. Accordingly, I find that the above-described unit constitutes an appropriate unit for collective bargaining. The only issues raised herein are whether or not leadman Brian Egland, Dan Kelm, Paul Mathis, Tim Parker, Dave Martinson, Bob Pagliaro, and Ed Danielson, are supervisors within the meaning of Section 2(11) of the Act and, consequently, should be excluded from any appropriate bargaining unit and whether or not four temporary employees, namely, Mike Shady, Miguel Mireles, Fernendo Rico and Lorenzo Kent, should be included in the unit found appropriate herein. . . . Regarding the temporary employees, the Employer contends that the four temporary employees are jointly employed by the Employer and Tandem for an indefinite period of time, share a community of interest with the Employer's regular employees and, therefore, should be included in the bargaining unit found appropriate herein. The Petitioner and Tandem maintain that the temporary employees are not jointly employed by the Employer and Tandem, do not share a community of interest with other employees of the Employer included in the bargaining unit and should not be included in the bargaining unit found appropriate herein.

. . . .

The record establishes that the employees solely employed by the Employer, whom the Petitioner seeks to represent, excluding the four temporary employees supplied by Tandem, constitute an appropriate unit for collective bargaining. Accordingly, and as discussed below, I find that the temporary employees are jointly employed by the Employer and Tandem but do not share a community of interest with the other employees included in the bargaining unit, and should be excluded from the bargaining unit found appropriate herein.

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TEMPORARY EMPLOYEES

Since early May 2001, Tandem has supplied temporary general labor to the Employer. Until June 29, 2001, there were 20 temporary employees. From June 29 until July 16, 2001, when the second shift is scheduled to start up again, Tandem will supply on an indefinite basis four temporary employees to the Employer. The Employer takes the position that these four temporary employees, Miguel Mireles, Fernando Rico, Lorenzo Kent and Mike Shady, should be included in the bargaining unit

The temporaries supplied by Tandem perform the same jobs as the Employer's regular employees. The temporaries have done glass line utility, assisted in press operations, assisted in the machine shop and assisted in the assembly area. The supervisors and leads employed by the Employer supervise the temporary employees. Tandem has no supervisors on site at the Employer's plant. The temporaries goes through the same orientation program as the Employer's other employees. They have the same hours, breaks and lunch time and use the same restrooms and break rooms as the Employer's other employees. Although the solely employed employees of the Employer are paid on Thursdays, the temporaries are paid by Tandem on Fridays. The Employer does not sign the checks of the temporary employees. Their checks are signed by Tandem. The temporaries do not use the time clock which the Employer's employees use. Although initially the Employer records their time on the same time sheets on which it records the times of its regular employees, the Employer sends the times to Tandem on Tandem stationery.

Employees of the Employer receive medical and dental insurance and life and disability insurance and are eligible for a 401(k)plan. They also receives paid holidays and paid vacation. The temporary employees receive none of these benefits. The temporaries are also not entitled to the Employer's Workmen's Compensation and Unemployment Insurance. Whereas the Employer's employees are paid $15 to $16 per hour, the temporary employees are paid a base rate of approximately $8 per hour and an attendance incentive of $1.50 per hour. The pay rates of temporary employees are set by Tandem. Tandem recruits, interviews, selects and tests the employees. The parties stipulated that Tandem handles all payroll and benefits for the temporary employees assigned to the Employer, and I so find. Although the Employer can request Tandem not to assign a particular temporary to work for it, Tandem is responsible for the discharge the temporary employees whom it furnishes to the Employer. Under Tandem's confirmation agreement with the Employer, Tandem is designated as the employer of the temporary employees. If the temporary employees have grievances on a job or concerns about a job, they are instructed to contact their service coordinator at Tandem.

Tandem provides safety glasses to the temporary employees and deducts from their paychecks the cost of those glasses. If the temporary does not have their own steel toe work shoes, Tandem provides them with toe caps. Upon request, Tandem will also supply them with safety back belts.

On a daily basis, the temporary employees report to a supervisor at Tandem's office to let Tandem know that they are there and ready to go to work at the Employer's facility. They are then assigned to the Employer's account for that day.

Although it appears that the Employer has, in the past, hired as regular employees temporaries supplied by employers other than Tandem, no Tandem employees have ever been hired for full-time employment with the Employer. Inasmuch as the Employer has not hired any new employees for at least two and one-half years, any temporaries whom it hired for full-time employment appear to have been hired prior to that time. The agreement between Tandem and the Employer provides that the client shall not hire a Tandem service employee "for the first 90 days of such employee's assignment to the client". An additional agreement provides that the Employer will not hire an employee supplied by Tandem for 30 days after that employee last performs work for the Employer.

DISCUSSION OF THE TEMPORARY EMPLOYEES

Section 9(a) of the National Labor Relations Act provides "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of

employment or other conditions of employment. . . . ." 29 U.S.C. Section 159(a). In making a determination as to whether a petitioned for unit is appropriate, the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the stature requires that the unit be the only appropriate unit or the most appropriate unit. See *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). The Act only requires that the unit sought be an appropriate unit for the purposes of collective bargaining. See *National Cash Register Co.*, 166 NLRB 173, 174 (1966).

Although the unit sought by a petitioning labor organization is a relevant consideration in determining the scope of a bargaining unit, a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to the unit that is requested does not exist. See *Overnite Transportation Company*, 322 NLRB 723 (1996); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). Although an Employer may seek a broader unit and that unit may be appropriate, it does not necessarily render the petitioner's unit inappropriate. See *Overnite Transportation Co.*, *supra*.

Whether or not the temporary employees supplied by Tandem to the Employer should be included in the petitioned for voting unit is governed by the Board's decision in *M. B. Sturgis, Inc.*, 331 NLRB [1298] (August 25, 2000). Under *Sturgis*, temporary employees can only be included in a unit with employees who are solely employed by the user employer if the user employer and supplier employer are joint employers and the employees share a community of interest. See *M. B. Sturgis, Inc.*, 331 NLRB at 1305.

In order to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. See *M. B. Sturgis, Inc.*, 331 NLRB at 1301 citing *NLRB v. Browning Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). There can be no finding of joint employer status unless the two employers jointly and meaningfully affect matters that relate to the employment relationship of the jointly employed employees, such as hiring, firing, disciplining, supervising and directing." See *Riverdale Nursing Home*, 317 NLRB at 882.

The record evidence shows that Tandem is responsible for interviewing, selecting and hiring all employees supplied to the Employer and establishes that Tandem is solely responsible for discharging the temporary employees.

The record establishes that the Employer assigns, directs and oversees the daily work of the employees supplied by Tandem. In addition, the employees supplied by Tandem perform the same duties and share the same employee facilities as the employees exclusively employed by the Employer. While the Employer may not be able to discharge a Tandem temporary employee, it clearly can have the employee removed from its service. The Employer also monitors the time worked by the temporary employees in its service.

Based upon the above, it is apparent that the Employer and Tandem affect and codetermine essential terms and conditions of employment of the temporary employees supplied by Tandem to the Employer. Accordingly, I find that the Employer and Tandem are joint employers regarding the employees supplied by Tandem to the Employer. See *Riverdale Nursing Home*, 317 NLRB at 882.

Having found that the Employer is a joint employer with Tandem, I must determine whether or not the jointly employed employees of Tandem and the Employer and the solely employed employees of the Employer share a community of interest. In determining whether a unit is appropriate, a major determinate is the community of interest and duties of the employees involved. In applying a community of interest test, the Board analyzes bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. See *J. C. Penney Co.*, 328 NLRB 766 (June 18, 1999); *Armco, Inc.*, 271 NLRB 350, 351 (1984).

The record clearly discloses that the jointly employed employees share some interest with the solely employed employees of the Employer whom the Union seeks to represent. The two employee groups work side-by-side, perform identical work under the same supervision and working conditions, work essentially the same hours and are scheduled in the same manner by common supervision. The Employer monitors the time of temporary employees furnished by Tandem which it forwards to Tandem for payroll purposes. Although the above establishes that the jointly and solely employed employees of the Employer have many common interests, there are also some major differences in their terms and conditions of employment. The jointly employed employees are hired by Tandem without any input by the Employer. Tandem establishes and controls the wages received by the temporary employees, and these temporary employees are carried on the payroll of Tandem. Tandem is also responsible for taxes and Workmen's Compensation for the employees whom it supplies the Employer. The jointly employed employees are not entitled to benefits furnished by the Employer for its solely employed employees, and fringe benefits, if any, enjoyed by the temporary employees are provided by Tandem. Although it appears that the Employer can have a jointly employed employee removed from service, Tandem has the sole responsibility to discharge the employees whom it supplies the Employer. The employees supplied by Tandem do not automatically become regular employees of the Employer. The Employer has not hired any temporary employees for over two and one-half years, has never hired a Tandem supplied employee, has not informed any Tandem employees that it has plans to hire them in the future and appears to have no intent on hiring Tandem employees at this time. Indeed, the Employer is specifically prohibited by its contract with Tandem from hiring any of the temporary employees for the first 90 days of such employee's assignment to the Employer. Thus, it appears, that no employees could be hired at this time by the Employer even if there was a need for employees.

The Employer's reliance upon *Outokumpu Copper Franklin, Inc.*, 334 NLRB (June 6, 2001), to support its position that the jointly employed employees share a community of interest with the Employer's regular employees and should be included in the unit with the regular employees is misplaced. In *Outo-*

kumpu, the Board held that the temporary employees supplied to *Outokumpu* from three staffing agencies shared a community of interest and should be included in the voting unit because the temporary employees worked side-by-side with the employer's production and maintenance employees in all areas of the plant, the employer's supervisors had full authority to discipline, discharge and send home the temporaries, the employer's supervisors evaluated temporaries for future employment, the temporaries were the sole source for the employer's regular production and maintenance employees, and the employer exclusively determined the wage rates the temporary employees would receive. See *Outokumpu*, supra. Many of the facts present in that case are not present in the instant case. For instance, here, temporaries are not the sole source for the Employer's regular work force, and Tandem's hiring of the temporaries whom it supplies to the Employer is not based on criteria determined by the Employer. In *Outokumpu*, the Board found that "dissimilar terms and conditions of employment are substantially outweighed by the many common terms and conditions of employment shared by the regular and temporary employees." *Outokumpu*, supra. In the instant matter, the dissimilar terms and conditions of employment of the temporary employees supplied by Tandem and the Employer's solely employed employees are not outweighed by the common terms and conditions of employment.

The facts in *Interstate Warehousing of Ohio, LLC*, 333 NLRB (2001), also relied upon by the Employer, are distinguishable from the facts of the instant case. In that case, the employer obtained all of its permanent employees by hiring from its temporary employees. In the instant case, the Employer has never hired from Tandem's supplied employees and, in fact, has hired no new employees for two and one-half years. As the Regional Direct found in *Interstate Warehousing of Ohio, LLC*, 333 NLRB at, "a significant number of temporary employees are converted to permanent employees of the Employer after completing a probationary period". Here, the jointly employed employees of Tandem and the Employer share a common work function, hours and supervision with the Employer's permanent employees while working side-by- side with them, and these factors, as they did in *Interstate Warehousing of Ohio*, demonstrate a high degree of functional integration and interchangeability and work related contact between the temporary and permanent employees. Unlike that case, though, these community of interest factors cannot be considered in conjunction with the temporary employees' expectations of conversion to permanent employees of the Employer. While in *Interstate Warehousing of Ohio* the status of temporary employees was analogous to the status of a probationary employee with a reasonable expectation of permanent employment in the bargaining unit, in the instant case, the jointly employed employees of Tandem and the Employer do not have an expectation that they will be offered permanent status, and they are not akin to probationary employees.

In view of the above and the record as a whole and having carefully considered the traditional community of interest factors relied on by the Board, I find that the temporary employees supplied by Tandem to the Employer do not share a community of interest with the Employer's regular hourly employees , and I conclude that the employees solely employed by the Employer whom the petitioner seeks to represent, excluding the employees supplied by Tandem, constitute an appropriate unit for collective bargaining. There are sufficient dissimilarities between the two groups of employees to warrant a finding that the employees employed solely by the Employer constitute an appropriate unit. For all of these reasons, I will exclude from the bargaining unit the temporary employees furnished by Tandem to the Employer. See *Overnite Transportation Co.*, 322 NLRB at 724–725; *M. B. Sturgis, Inc.*, 331 NLRB at 1306.